STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2008
v	No. 277853 St. Clair Circuit Court
MOSES RABBIT KIRSCHKE, Defendant-Appellant.	LC No. 06-000294-FC

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of one count of armed robbery, MCL 750.529, for which he was sentenced to 25 to 40 years' imprisonment as a second habitual offender. MCL 769.11. Defendant was acquitted of attempted armed robbery. Both charged offenses occurred at the same Family Dollar store in Port Huron, Michigan; the armed robbery in November, 2005, and the attempted armed robbery in January, 2006. We affirm.

Defendant's primary argument on appeal is that his confession to the police while in custody was involuntary. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). It is the prosecution's burden to show by a preponderance of the evidence that a waiver is made voluntarily, knowingly, and intelligently. *People v Daoud*, 462 Mich 621, 633-634; 614 NW2d 152 (2000). *Miranda*[1] rights have been properly waived only when the "totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension." *Id.* at 635 (internal quotation marks and citations omitted). Under *Daoud*, the trial court must determine both whether the waiver was voluntary and whether it was knowingly and intelligently made. *Id.* at 639. Defendant presents no argument that his confession was not knowing and intelligent.

The trial court held a *Walker*[2] hearing. After listening to the testimony of the detective who interrogated defendant, Detective David Patterson, as well as to that of defendant himself,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

the court declined to find any evidence that defendant's statements were the result of coercion or were otherwise involuntary. We agree.

Defendant first argues that his confession was involuntary because the interrogation[3] lasted for more than five hours. The trial court agreed that five hours was a long time to be interrogated. However, the trial court also correctly noted that defendant was being interrogated for multiple robberies, so five hours might "simply represent the appropriate amount of time spent with a person willing to talk to you in order to try to learn everything that they knew about the case and determine whether or not they did, in fact, commit the crimes charged." The court also noted that defendant was accommodated in many respects during the interview, including being permitted to telephone his girlfriend at least once and being given a drink when he was thirsty. Under these circumstances, we find no error in the trial court's determination that five hours was not excessive.

Defendant next argues that his confession was involuntary because he was implicitly promised leniency. However, it appears that police officers actually informed defendant that defendant's crimes would be delivered to the prosecutor's office in a single "package," which defendant interpreted as a promise of a "package deal." Defendant conceded, however, that the police did not "use those exact words" or promise any particular length of sentence. Patterson testified that he did not imply to defendant that defendant would receive lenity, only that it would be in defendant's interests to cooperate, and he further testified that he would have informed defendant that he lacked the authority to make a deal. We again find no error in the trial court's determination that defendant did not receive a promise of leniency.

Defendant next argues that he was psychologically coerced.[4] We disagree. Defendant was repeatedly instructed to be honest and truthful, and he was further instructed not to admit to any offense he did not commit. Defendant did not, in fact, admit to all of the crimes: he described robberies of a hair salon and a shoe store as "copycat" crimes. Defendant contends that he did not understand his *Miranda* rights. However, defendant testified at his *Walker* hearing that Patterson discussed defendant's *Miranda* rights with him, that defendant told Patterson that he understood those rights, and that in fact defendant did understand those rights. A defendant may not take a position in the trial court and then argue to the contrary on appeal. *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006). The trial court did not err in finding no coercion.

Defendant finally contends that the police took advantage of his emotional vulnerability and intoxicated state.[5] However, a statement is not involuntary just because it was made under

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[3] Defendant was initially interviewed at around 5:00 a.m., for approximately 20 minutes according to Patterson or for approximately an hour according to defendant. The second interrogation – initiated by Patterson because of inconsistencies in defendant's statements at the first – is the one at issue.

[4] Defendant does not allege that he was physically coerced or threatened.

[5] Defendant claimed that he was intoxicated on marijuana, Tequila, beer, and Ecstasy during the interrogations.

the influence of intoxicants, *People v Lumley*, 154 Mich App 618, 624; 398 NW2d 474 (1986), and "absent police coercion, a defendant's mental state alone can never render the confession involuntary." *People v Cheatham*, 453 Mich 1, 16; 551 NW2d 355 (1996). A forensic evaluation found "little evidence to support th[e] conclusion" that defendant "was unable to understand his Miranda rights due to . . . an intoxicated state." Patterson testified that defendant seemed to be a "highly intelligent" individual who was not only alert enough to engage in the interview process, but that he knew "how to be evasive" and only admitted to participation in the crimes when he was presented with "certain elements [of which Patterson] had physical proof." Accordingly, it was highly unlikely that defendant's statements were rendered involuntary by either intoxication or emotional vulnerability. Therefore, there was no clear error in the trial court's conclusion that the statements and waivers were voluntary.

Defendant additionally argues that he was prejudiced by prosecutorial misconduct throughout the trial. We disagree.

Issues of prosecutorial misconduct are considered on a "case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of a case. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). Prosecutors are given a great deal of latitude to argue and conduct the prosecution, so long as their arguments are supported by the evidence and any reasonable inferences therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant first argues that the prosecutor improperly presented police testimony opining that, because another suspect had been eliminated from suspicion for being too tall, defendant must therefore be guilty. Defendant argued at trial that the police had failed to investigate a viable suspect whose footprints were found at the scene of the crime and who might have matched a witness's description of the robber. Defendant does not object to the police officer's testimony per se,[6] but rather to the prosecutor's rebuttal argument relying on the officer's testimony. We find that the prosecutor accurately paraphrased the officer's testimony, explaining that the other suspect had been considered and ruled out "because he didn't match the complete description." We find this a fair rebuttal argument based on the evidence admitted in the case.

Defendant also argues that the prosecutor improperly appealed to the jury's sympathy for the victims – the clerks who were working at the store during the robbery. Specifically, the

[6] In any event, the officer's testimony about eliminating Luna due to his height came on redirect examination after defendant had opened the door by asking the officer if he "investigated Miguel Luna any further?" The officer responded, "After checking for facial description, it didn't match the Family Dollar, no." On redirect, the officer responded to the prosecutor's question about whether Luna's description fit the robbery suspect by stating, "He was too tall. He was over six feet tall." "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

victims testified regarding their fear following the robbery and their subsequent inability to return to work at the store; the prosecutor emphasized "their testimony that this has affected their lives" during closing argument. Defendant concedes that, pursuant to MCL 750.530(1),[7] the prosecutor was required to prove, among other things, that defendant put the victims in fear during the robbery. However, defendant contends that the victims' testimony pertains only to their fears *after* the robbery and is therefore irrelevant. We disagree. The record shows no improper questioning of the victims regarding their fear over the robbery. The prosecutor noted in closing that the victims no longer work in retail and that one went through counseling "as a result of this event" in the context of showing their post-incident behavior to be evidence that they had been fearful during the incident. The prosecutor's emphasis on the victims' continuing expression of fear over the incident did not improperly shift the focus of her case from the crime at issue to the victims' current feelings; rather, it served to highlight the intensity of the fear they experienced as a result of the robbery.

Defendant next argues that the prosecutor undercut her burden of proving him guilty beyond a reasonable doubt by obtaining the jury's commitment to disregard the lack of evidence and convict nonetheless. Defendant claims that during jury selection, the prosecutor improperly addressed the jury when she stated the following:

> And do all of you understand that in a trial obviously you're going to hear a lot of information? You're going to hear from a lot of people. But you might not hear everything that you want to hear. You might think in your mind, gees, I wish I would have heard from this, or I wish I would have seen this type of evidence. But you understand that you can only base your decision on what you hear in the courtroom. Do all of you understand that? Okay.

We find this to be nothing more than the prosecutor's proper admonition to the jury that they were only to consider the evidence admitted at trial in reaching their verdict, rather than urging the jury to disregard the evidence. The trial court similarly and properly instructed the jury that it must "only consider the evidence that has been properly admitted" and that "the lawyers' statements and arguments in the case are not evidence." We presume that jurors will follow their instructions, and there is nothing in the record to suggest otherwise here. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant finally claims that he received ineffective assistance of counsel for a variety of reasons. We disagree. Assistance of counsel is presumed to be effective; to show otherwise, defendant must show that counsel's performance was so objectively deficient that he was deprived of a fair trial and it is reasonably probable that the outcome of the proceedings would have been different but for counsel's substandard performance. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

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[7] MCL 750.530 (unarmed robbery) is incorporated into MCL 750.529 (armed robbery) by reference. *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).

Defendant first argues that his trial counsel should have moved to sever the charge of attempted robbery from the charge of armed robbery. Joinder is permissible when offenses "are of the same or similar character," or when they "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." *People v Tobey*, 401 Mich 141, 150; 257 NW2d 537 (1977). However, when offenses have been joined together "solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses." *Id*., 151 (quotation marks omitted). MCR 6.120(B) is a codification of *Tobey*. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). The two charged offenses here were clearly separate offenses and were only of the "same or similar character." Defendant therefore correctly states that he had a right to severance.

Nevertheless, defendant was acquitted of the attempted robbery charge. Defendant contends that his acquittal on this charge does not negate the prejudice he suffered with respect to the charge of armed robbery, as the multiple counts marked him as a bad man. In support, defendant cites the following passage – critically, minus the portion in italics – from *People v Daughenbaugh*, 193 Mich App 506, 511; 484 NW2d 690, mod in part on other grounds 441 Mich 867 (1992):

> The fact that a defendant is formally faced in the same trial with additional charges does have an effect greater than if evidence of other (uncharged) offenses are presented. The defendant is cast as a bad person by the sheer number of counts in the information. *The jurors are afforded greater room for compromise by the larger number of counts (i.e., they might agree to convict on some counts and acquit on others, an option not readily available when fewer counts are presented for the jury's consideration). Finally,* the amount of evidence that the prosecutor would be permitted to introduce may well be greater if the prosecutor is attempting to prove the defendant's guilt of the additional charge than if merely trying to show that the defendant committed the other (uncharged) bad act.

In *Daughtenbaugh*, the defendant was tried on four counts of armed robbery and four related counts of possession of a firearm during the commission of a felony, which was deemed possible to induce a jury compromise. But fewer counts reduce this danger; although it is not clear how many counts are required before the danger of compromise is too high, it is simply not possible to compromise on a single count.

More importantly, the prosecution's case was not without *any* doubt, and defense counsel may reasonably have concluded that there was enough reasonable doubt for the jury to acquit defendant of *both* charges. Counsel might have surmised, for example, that the evidence underlying the attempt charge was weak, the footprint evidence pointed to a more viable perpetrator, and those weaknesses in the prosecution's case could induce the jury to view the armed robbery charge in defendant's favor as well. We will not second-guess trial counsel in matters of strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also asserts that trial counsel was ineffective for failing to call an expert witness to testify on the phenomenon of false confessions. On appeal, defendant argues that this was trial counsel's main theory of defense, and that the absence of expert testimony on the subject denied defendant's constitutional right to a fair trial. However, this argument fails because defendant does not argue on appeal that his confession was in fact false and the result of

police coercion, but only that an expert's testimony on the matter in favor of defendant could have "sown the seeds of reasonable doubt." This is a purely speculative argument that does not satisfy defendant's burden on the issue. Defendant has not shown that there was a reasonable probability that if an expert had been called, the result of the trial would have been different. Because we find no prejudicial error in any of defendant's individual claims, there can necessarily be no cumulative prejudice, either. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Finally, defendant raises in a Standard 4 brief the argument that, in a different trial, defense counsel moved for an evidentiary hearing regarding the accuracy of a DVD copy of his police interrogation. Apparently, no similar motion was made in this litigation, but the matter arose at the *Walker* hearing because defendant asked the trial court to conduct an independent review of the videotape of the interview to determine whether his confession was coerced and whether the DVD was an accurate copy of the videotape. The trial court found doing so unnecessary because it had been presented with no evidence of "any significant dispute as to what occurred." We find no error in the trial court's decision. Defendant does not provide any evidence to suggest that the DVD was not accurate or that it had been tampered with, and in fact, the original videotaped version was apparently played for the jury at trial. Defendant also provides nothing to suggest that the videotape would reflect coercion or tampering, and as discussed, defendant's claims of coercion are meritless. We perceive no error or prejudice with respect to the DVD. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis